UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATION BOARD
REGION 9

CARRIAGE INN RETIREMENT COMMUNITY
OF DAYTON, INC. [1]/

Employer

and

Cases 9-RC-17783
9-RC-17786

DISTRICT 1199, WV/KY/OH, THE HEALTH
CARE AND SOCIAL SERVICE UNION, SEIU,
AFL-CIO [2]/

Petitioner

REGIONAL DIRECTOR'S ORDER CONSOLIDATING CASES AND DECISION AND DIRECTION OF ELECTION

The Employer, a nursing home providing long term skilled and intermediate care at its facility located in Dayton, Ohio, is one of six separately incorporated nursing homes managed by Multi-Health Services Corporation and owned by MHS Holdings, Incorporated. Multi-Health Services and MHS Holdings are owned by Robert Huff. The Petitioner filed a petition with the National Labor Relations Board under Section 9(c) of the National Labor Relations Act in Case 9-RC-17783 seeking to represent a unit comprised of the Employer's full-time and regular part-time licensed practical nurses (LPNs) and therapy assistants employed at the Employer's Dayton, Ohio facility, excluding all registered nurses (RNs), office clerical employees, confidential employees, and guards and supervisors as defined in the Act. The Petitioner filed a separate petition in Case 9-RC-17786 seeking to represent essentially a unit comprised of the Employer's full-time and regular part-time RNs, therapists, and speech language pathologists employed at the Employer's Dayton, Ohio facility, excluding all office clerical employees, confidential employees, all other employees and all guards and supervisors as defined in the Act. The cases have been consolidated for consideration and decision. There is no history of collective bargaining affecting the employees involved in these proceedings.

A hearing officer of the Board held hearings on the issues raised by the petitions and the Employer and Petitioner filed briefs with me. The parties disagree with regard to the supervisory status of the LPNs in the unit in Case 9-RC-17783 and of the RNs in the unit in

[1]/ The Employer's name was amended at hearing to reflect its correct legal name.

[2]/ The Petitioner's name was amended at hearing to reflect its correct legal name.

Case 9-RC-17786. The Employer, contrary to the Petitioner, contends that all of the RNs and LPNs who work as "unit nurses" are supervisors within the meaning of Section 2(11) of the Act. I note that the Petitioner has indicated a willingness to proceed to an election in any unit found appropriate in both Case 9-RC-17783 and Case 9-RC-17786. In this regard, I note that the parties stipulated in Case 9-RC-17783 that the Employer's employees in the classifications of licensed physical therapist, licensed clinical occupational therapist and licensed speech therapist are professional employees who should be included in an appropriate professional unit.

I have carefully considered the evidence and the arguments presented by the parties on the issues. I have concluded that the LPNs and RNs, also referred to herein as unit nurses, are supervisors within the meaning of Section 2(11) of the Act. In reaching this conclusion, I find that the unit nurses have the authority, in the interest of the Employer, to assign and responsibly direct the work, excuse tardiness, adjust grievances of employees and that the exercise of such authority requires the use of independent judgment.

To provide a context for my discussion of the issues, I will first provide an overview of the Employer's operations. I will then present, in detail, the facts and reasoning that supports each of my conclusions on the issues.

I. OVERVIEW OF OPERATIONS

The Employer operates an 85-bed nursing home facility that provides skilled and intermediate nursing care. The facility, a single-story structure laid out in the shape of the letter "H," contains four separate units with an approximately equal number of beds. Two nursing units occupy each leg of the "H" with administrative offices and common areas occupying the cross bar. The units are referred to as the 100, 200, 300, and 400 units or halls. There is a nurses' station located between the 100 and 200 units, referred to as the "front," and another nurses' station between the 300 and 400 units, referred to as the "back," on the other leg of the "H." The 300 hall, also known as the tapestry unit, is a locked unit where Alzheimer's patients and others reside who are at risk of wandering off or running away from the facility.

R. Huff is the Employer's president. Gary Armitage, the Employer's administrator, is in charge of the day-to-day operation of the facility, although he only works at the facility 2 days a week. Reporting to Armitage are the Assistant Administrator, Josh Huff, who is employed at the facility on a full-time basis; the Interim Director of Nursing, Janice Roush; the Assistant Director of Nursing, Christine Coldiron; the Staff Development Coordinator, Carolyn Gardner; the MDS (Minimum Data Set) Coordinator, Jennifer Yeaney; and the Acting Restorative Nurse, Jeanette Wright. Also employed at the Employer's facility are: the Dietary Department Head, Linda Edwards; the Maintenance/Housekeeping and Laundry Department Head, Mike Stewart; the Therapy Department Head, Charisse Blevins; the Activities Director, Terri Deaton; the Business Office Manager, Carolyn Conner; the Social Services Director, Molly Eggleston; and the Admissions Director, Mandy Pothorf.

The nursing and patient care staff consists of 8 RNs, 4 of whom work full-time and 4 others who work regular part-time; approximately 14 to 17 full-time and regular part-time LPNs; 43 to 51 certified nurses' aides CNAs; and about 12 to 20 service and maintenance,

laundry, housekeeping, and dietary employees. The facility is staffed 24 hours a day, 7 days a week. The nursing staff works three shifts Monday through Friday, from 7 a.m. to about 3 p.m., from 3 p.m. to about 11:30 p.m., and from 11 p.m. to 7:30 a.m. On Saturdays and Sundays, the CNAs continue to work a three-shift schedule. However, the unit nurses work a 16-hour shift that covers the span of the weekly day and evening shifts. The weekend unit nurses on the night shift work the same schedule that the night shift operates on during the week. The Employer attempts to staff each unit with two CNAs and one unit nurse on the day and evening shifts, and with one unit nurse and three CNAs covering two units on the night shift. The staffing levels are the same during the weekend as they are during the week.

The record discloses that unit nurses may either be RNs or LPNs, and that they perform the same duties with the exception that RNs are licensed to administer certain medical procedures that LPNs cannot perform. The RN and LPN unit nurses do not have any authority over each other. The RNs are paid an hourly wage rate between $20.50 an hour to $22 an hour. The LPNs are paid between $17.25 an hour to $20.75 an hour, and the CNAs are paid from $8.50 an hour to $14.05 an hour, or an average of $10.38 an hour.

RN AND LPN UNIT NURSES [3]/:

The daily routine for unit nurses consists of passing out medications to residents, performing tube feedings, and setting up IVs for those residents receiving intravenous fluids or medications. Unit nurses also perform basic medical procedures as ordered by physicians, answer residents' call lights, and take them to the dining room for meals. Approximately 6 hours of the unit nurses' 8-hour shift is spent in the performance of these types of patient care tasks. The remaining 2 hours of each shift is spent telephoning residents' families and charting and performing other types of paperwork, including recording all of the vitals taken on the shift and making nurse's notes on the condition of each resident under the unit nurse's care.

The Employer contends that the RN and LPN unit nurses possess 8 of the 12 criteria set forth in Section 2(11) of the Act. The only statutory authority that the Employer would apparently concede they do not possess is the authority to lay off and recall, and the authority to hire, or to effectively recommend these actions. The Petitioner avers that the RN and LPN unit nurses do not possess any of the indicia set forth in Section 2(11) of the Act. I have discussed in detail below the indicia that the Employer contends to establish that its unit nurses are statutory supervisors.

Discipline, Suspend, and Discharge

The record discloses that the Employer has a progressive disciplinary procedure that begins with verbal counseling or a written warning. Additional written warnings for infractions may also carry the penalties of suspension or discharge. Progressive discipline is not used for certain types of serious offenses, such as theft, resident abuse and insubordination, for which immediate discharge may be deemed appropriate.

[3]/ RN and LPN unit nurses are also variously referred to in the records as charge nurses and floor nurses.

The record discloses that approximately 30 disciplinary actions were taken against CNAs in approximately the 1-year period preceding the hearings in these matters. None of those disciplinary actions was taken by a RN or LPN unit nurse. This lack of issuance of any disciplinary action by unit nurses apparently coincides with the period of time that Linda Williams was the administrator at the facility. Williams began her employment with the Employer as administrator in about the middle of 2002 and she was discharged from her position in about mid to late April 2003. After being appointed as administrator, Williams issued a memorandum to department heads on about March 7, 2003, in which she advised, in part that, "I must be informed of all disciplinary actions prior to occurrence. Prepare all documentation for my review before informing the employee."

Former DON Dee Bailey testified that she could recall no instance during her most recent tenure as DON, from October 2002 to April 7, 2003, in which a unit nurse disciplined a CNA. In fact, unit nurses were advised in about August or September, and again in December 2002, that they were not authorized to discipline CNAs or to send them home for disciplinary infractions without first discussing the situation with Williams and obtaining her approval. Bailey also testified, however, that during an earlier stint as DON in 1999 and 2000 that unit nurses were authorized to discipline CNAs. In fact, unit nurses issued written verbal counselings, written warnings, and effectively recommended suspensions, and at least one discharge, relating to CNAs before Williams became the administrator at the facility. Regarding discharges, the record reveals that a unit nurse's recommendation that a CNA be discharged during Williams' tenure was not followed. On another occasion, nearly 2 years prior to Williams' tenure, a stipulated supervisor rejected a unit nurse's recommendation that an employee receive a written warning in favor of counseling because the warning was too harsh.

The Employer's "Personnel Policy and Procedure Manual" contains a form entitled, "Disciplinary Action Report," that appears to have been used by unit nurses before Williams became the administrator. However, the record shows that the unit nurses did not complete the "Action to be Taken" section of the form because they are not privy to the CNAs' personnel files and may not be aware of other disciplinary action that a particular CNA has received. Moreover, anecdotal evidence indicates that disciplinary action meted out to CNAs by unit nurses before Williams' tenure was subject to an independent investigation by the DON.

The Employer discharged Williams in about mid to late April 2003. However, there is no evidence that the Employer informed employees that the personnel policies that were in effect during William's tenure, including those involving the issuance of discipline, had been changed. In fact, Acting DON Roush testified that she did not tell any LPNs, in their capacity as unit nurses, that their duties had changed.

Reward and Promote

The record discloses that unit nurses have at times evaluated the performance of CNAs. However, they did not evaluate CNAs during Williams' tenure because Williams reserved this authority to herself. Unit nurses resumed evaluating CNAs in early May 2003 at the behest of Interim Director of Nursing Roush. At least one unit nurse was asked to evaluate employees after she advised the Employer that she had been subpoenaed to testify in the first of the two

hearings in these cases. Witnesses, including Roush, testified generally that there is a direct correlation between an employee's performance evaluation and the amount of a raise that he or she receives. However, Roush and other witnesses also testified that the amount of the raise is at the discretion of the administrator and that they were unaware of any limits on the administrator's discretion.

Former DON Bailey testified that she did not evaluate unit nurses during the period of time that Williams was the administrator. Although the source of her knowledge is unclear, Bailey testified generally that nurses could receive an annual increase up to 50 cents an hour and that CNAs were eligible for an increase of up to 25 cents an hour. She also testified, again without reference to the source of her knowledge, that the variance in an annual raise between employees was small, perhaps a nickel an hour. She conceded that she did not know whether evaluations affected the amount of a raise that employees received. She testified that she believed the administrator of the facility determined the amount of the raise and that she was not directly involved in determining raise amounts. Bailey's role in reviewing the CNA evaluations performed by unit nurses prior to Williams's tenure was limited to reviewing and verifying attendance records and signing the evaluations before forwarding them to the administrator. Former ADON Stephanie Miller performed a similar function with respect to evaluations, again during the timeframe preceding Williams' tenure. However, Miller also reviewed the evaluations with the CNAs. It is not clear whether she or any other supervisor revised evaluations submitted by the unit nurses.

Evaluations used by unit nurses for CNAs in the first part of 2002 reflect that CNAs are evaluated in a number of performance areas on a scale of 1 to 4, with a 1 indicating that the CNA is generally poor or unsatisfactory and a 4 indicating that the CNA's performance is superior or excellent. The evaluation forms do not contain a place for a unit nurse to recommend a raise and there is no evidence that unit nurses make such a recommendation independent from the performance category ratings that they assign.

Unit nurses have apparently recommended CNAs for positions in the Employer's medical records and central supply departments, and as restorative aides. In the examples given the CNAs were "promoted" into these positions based on the recommendation of Acting Restorative Nurse Wright. The record is not clear as to whether Wright was in a supervisory position at the time that she made these recommendations or whether CNAs in these positions receive a higher hourly rate of pay than CNAs who work on the patient units. Until about the middle of 2002, the Employer had a position designated as senior aide, although the position has since been discontinued. Seniors aides were selected by the unit nurses and received $1 more an hour than regular aides received.

There is testimony that the unit nurses call employees in to work or ask them to work over to fill holes in the schedule caused by employee absences. This topic is treated more fully in the discussion of the unit nurses' authority to assign CNAs. However, for purposes of this section the record reflects that unit nurses were not overly concerned with whether the use of a particular CNA to fill a hole in the schedule would result in overtime pay for that CNA. In this regard, there is no evidence that unit nurses would have been particularly knowledgeable in

many cases as to whether the unscheduled use of a CNA might result in overtime. Thus, theoretically unit nurses could direct overtime hours toward favored CNAs and in this manner reward them. However, Williams had advised at least some of the unit nurses that all overtime had to be approved by her. Again, there is no evidence that the Employer rescinded this instruction following her discharge.

Transfer and Assign

The unit nurses and CNAs typically are scheduled by Staff Development Coordinator Gardner to regularly work on the same unit on the same shift. Thus, the nursing staff, including the CNAs, typically handle the same patients day after day. Gardner prepares monthly, weekly, and daily assignment sheets for all of the staff in the facility, including the unit nurses and the CNAs who work in the four patient units. A substantial amount of testimony was devoted to the issue of how unit CNA staffing levels are maintained or obtained when there are unexpected absences or "holes." In this regard, there is some conflict in the record as to the appropriate procedure to be used in calling in CNAs to fill "holes" in the schedule or in having CNAs remain at work for part or all of the following shift to ensure that staffing levels are in accordance with state law. Regardless of the priority used in filling holes in the schedule, it is clear that the call-in list of employees, that is located at each nursing station and which is consulted to fill holes, is not prioritized in any fashion.

Former DON Bailey testified that during her tenure Gardner, who is in charge of scheduling, was responsible for replacing CNAs who had called off work. According to Bailey, a unit nurse usually received the call off and contacted Gardner, who then found a replacement. Gardner took staffing calls at all hours, including the middle of the night, and then telephoned employees until she was able to locate a replacement.

Acting Restorative Nurse Wright, who was in charge of scheduling for about a 2½ month period before Gardner was hired, testified that during that timeframe the second and third shift unit nurses attempted to first locate replacements themselves before contacting her to find replacement CNAs. Wright apparently was not on call 24 hours a day as is Gardner. Although Gardner was hired to perform this scheduling task, Wright – a stipulated supervisor, apparently still attempts to first find replacements herself before turning to Gardner. Juanita Peyton, who became the Acting DON during these proceedings, also testified that she attempts to find CNA replacements before turning to Gardner for assistance, unless Gardner is in the facility at the time. However, until about 3 weeks prior to the second of the hearings in these matters, Peyton had not regularly worked as a unit nurse for 2 years. Wright conceded that most unit nurses rely on Gardner to find replacement CNAs. Indeed, unit nurses Carmen Cooley and Mildred Shepard testified that they immediately contact Gardner to replace absent CNAs. If Gardner is unsuccessful in finding a replacement, unit nurses or other CNAs sometimes voluntarily make additional calls in an attempt to replace a missing CNA, particularly to employees with whom they have a relationship.

Although there is some disagreement about the procedure for calling in replacement CNAs, it is undisputed that generally CNAs are not required to replace an employee who has

called off work. The exception to this is that one or more CNAs may be required to stay at the facility and work into the next shift when it is necessary for the facility to maintain state law minimum mandated staffing levels. The CNA selected to work into the following shift is often the one who is the last to leave the facility at the end of his or her shift.

Unit nurses change CNAs regular patient assignments when it is necessary to accommodate staffing and patient needs. Adjustments most often need to be made when a CNA must leave his or her shift early. Unit nurses make such changes without the authorization of anyone higher in the hierarchy of the nursing department. The unit nurse attempts to equalize the workload when it is necessary to redistribute the patient load as a result of the absence of a CNA. This is sometimes accomplished by "splitting the hall," having one of three CNAs work between two halls and by having the other two CNAs pick up the remaining patients on each hall. The workload is further equalized by dividing heavy and light assist patients equally between the CNAs. In making in-shift adjustments to patient assignments, unit nurses take into account the patient caseload, needs of the residents, the skills of the CNAs concerned, and staff available to cover the assignment. On at least some occasions, perhaps even a majority of the time, it is the CNAs themselves who determine how patients will be divided amongst those who are present on the shift when one of their number is absent. On other occasions, the unit nurses will agree on how to equalize their staff to make up for a CNA shortage on a particular hall.

Prior to the tenure of former administrator Williams, unit nurses were permitted to accommodate a CNA's request to switch unit assignments with another CNA. Williams, however, told unit nurses that they were not permitted to allow such switches. Unit nurses have never originated such switches on their own without the authorization of the ADON or another of the Employer's admitted supervisors.

CNAs have regularly scheduled lunch and break periods. However, those breaks may be changed by unit nurses to accommodate the needs of patients. In most instances, the CNAs will themselves decide which of them will take a break at a particular time in conformity with patient needs. CNAs are, however, required to inform the unit nurse on their unit when they are taking a break, unless the unit nurse is not on the floor at the time. In that case, the CNA is to inform the other CNA in the unit that he or she is taking a break. Unit nurses cannot change the days that CNAs work, but will convey such requests from CNAs to Gardner.

Unit nurses are responsible for keeping track of the hours worked for the CNAs who work in their units and on their shifts. In this regard, unit nurses may indicate to Gardner that a CNA who was tardy arriving to her shift should not have that tardy counted against him or her for attendance and disciplinary purposes when there has been good cause shown. Assuming minimum staffing levels, unit nurses may also release CNAs from their shifts early without seeking approval for good cause shown, such as the need to care for a sick child.

Daily assignment sheets, in which particular patient assignments for CNAs are noted, are sometimes completed by unit nurses. However, on other occasions, the CNAs themselves will put their names or initials on the daily assignment sheet to denote which patients are assigned to each CNA. Unit nurses sometimes modify the assignments on the daily assignment sheet,

regardless of who initially wrote in the assignments. Many of the specific patient duties that CNAs perform on a daily basis are set forth in "books" that are kept on each hall. These books break down CNAs' responsibilities by shift for such every day tasks like wheelchair maintenance and cleaning out and organizing patients' closets and drawers. Other specific tasks are set forth on the daily assignment sheets themselves, such as the bath schedule for patients, and columns to record patients' bowel movements, output, vitals, and meals. The daily assignment sheets generally remain the same from day to day and typically only change when there is a change in the patient population.

Responsible Direction

Many, if not all, of the discrete patient tasks performed by CNAs are the same from day to day and require little, if any, instruction in their performance. For example, many of the facility's patients are on a turn schedule to ensure adequate circulation and to prevent bedsores and other health issues. This schedule is posted behind the door in each patient's room who must be turned on a regular basis. Unit nurses, may however, ensure that turn schedules are complied with by directing CNAs to turn a patient or patients to obtain compliance with their schedule. Unit nurses may instruct CNAs to perform additional housekeeping tasks after all of their patient tasks have been performed. These tasks include bagging patients' personal items, cleaning the bed table, cleaning the wheelchair, and labeling personal items used at the bedside. In many instances, however, the CNA who has completed her regular patient duties early simply consults the CNA unit book within each unit for a list of additional tasks.

If a CNA does not understand how to perform a discrete task, a unit nurse may instruct him or her how to perform the duty. Unit nurses also instruct CNAs as to the timing of certain tasks. For example, monthly vital signs, including height and weight, are required to be taken for all patients and this task is one that the CNAs are expected to perform. Unit nurses also from time to time instruct CNAs to perform certain patient related tasks in a particular order. Such prioritizing may be necessary when, for example, a patient must be prepared for an off-site medical procedure or doctor appointment. In this regard, unit nurses direct CNAs from time to time to depart from their regular duties and to accompany patients to their doctor's appointments.

Time constraints do not permit unit nurses to dedicate segments of time solely to observing and monitoring the work that is performed by CNAs. Rather, when the unit nurses make their rounds, they identify any patient issues and bring those issues to the attention of the CNA who is responsible for that patient. A unit nurse's round might be expected to take about 45 minutes and such rounds are made every 2 hours. In this regard, one unit nurse testified about CNAs that, "the ones that are regular are pretty much self-directed," but that she just makes sure that they are doing what they are supposed to be doing.

Adjustment of Employees' Grievances

The Employer's Policy and Procedures Manual contains a three-step grievance procedure in which employees are requested to take problems for resolution to their immediate supervisor, then to their department director, and finally to their administrator. Yet, there is no evidence that

a formal or written grievance as provided for by the manual has ever been filed with a unit nurse. The record discloses that unit nurses adjust patient loads for CNAs in response to complaints from them about a load being unbalanced if they conclude that the load is, in fact, unbalanced. Unit nurses also attempt to moderate other types of disputes between CNAs on their units. However, if they are unsuccessful they refer the matter to the DON or to the RN, if the dispute involves medical issues, on call.

Secondary Indicia

If the unit nurses are not statutory supervisors, then there is no on-site supervision within the nursing department for an extended period of time each week. The DON works the day shift during the week. The administrator is apparently only in the facility 2 days a week and the assistant administrator is only present during the day shift throughout the week and occasionally on the weekends. The other stipulated supervisors within the nursing department, ADON Coldiron; Staff Development Coordinator Gardner; MDS Coordinator Yeaney, and Acting Restorative Nurse Wright, work only the day shift, Monday through Friday.

Gardner, whose duties include hiring employees, is on call 24 hours a day, 7 days a week. Acting DON Roush is not on call, but is available by telephone during non-working hours. When she receives a call during non-working hours, it is within her "discretion" as to whether she goes into the facility. In addition, state law mandates that there always be an RN on call when there are no RNs scheduled in the facility. The on-call RNs duties are, however, apparently related to the resolution of residents' medical issues as opposed to personnel issues.

Unit nurses attend department staff meetings that are not attended by CNAs. These meetings appear to be held at irregular intervals and involve in-services, discussions about patient issues, new equipment, and new regulations. They may also involve discussions about personnel issues, including problems with CNAs. Unit nurses have the only key access to the facilities' central supply area on the afternoon and evening shifts. Additionally, only unit nurses possess keys to the medicine carts, medicine room, and narcotics cabinet, where controlled substances are stored.

Unit nurses have, on occasion, some time keeping responsibilities relative to the CNAs on their respective units. Employees are required to punch a time card when leaving and returning from their meal break. Thus, if a CNA forgot to punch back in from a meal break, a unit nurse would sign the CNA's missed punch form to verify his or her time. This practice was changed under former DON Diane Jackson, Bailey's immediate predecessor, and continued under Bailey. During Jackson's tenure until about October 2002, all missed punch forms were signed by her and following her tenure Williams signed them. Quite recently, in May 2003, unit nurses have resumed signing missed punch forms. Unit nurses have declined to sign off on missed punch forms if the CNA was not working in the unit indicated on the form. In addition to the above, unit nurses also regularly pass out paychecks to the evening and night shift CNAs.

II. THE LAW AND ITS APPLICATION

(a) Legal Overview

Section 2(11) of the Act defines a supervisor as a person:

> . . . having authority in the interest of the employer to hire, transfer, suspend, layoff, recall, promote, discharge, assign, reward or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively recommend such action, if in connection with the foregoing, the exercise of such authority is not merely of a routine or clerical nature, but requires the use of independent judgment. . . .

In enacting Section 2(11) of the Act Congress emphasized its intention that only supervisory personnel vested with "genuine management prerogatives" should be considered supervisors and not "straw bosses, leadmen, set-up men and other minor supervisory employees." See, **Senate Rep. No. 105, 80th Cong., 1st Sess. 4**, reprinted in **1 NLRB Legislative History of the Labor Management Relations Act, 1947**. See also, *Chicago Metallic Corp.*, 273 NLRB 1677, 1688 (1985); *NLRB v. Bell Aerospace Co.*, 416 NLRB 267, 280-281, 283 (1974). Although the possession of any one of the indicia specified in Section 2(11) of the Act is sufficient to confer supervisory status, such authority must be exercised with independent judgment and not in a routine manner. *Hydro Conduit Corp.*, 254 NLRB 433, 437 (1981); *KGW-TV*, 329 NLRB 378 (1999). Thus, the exercise of "supervisory authority" in merely a routine, clerical or perfunctory manner does not confer supervisory status. *Feralloy West Corp. and Pohang Steel America*, 277 NLRB 1083, 1084 (1985); *Chicago Metallic Corp.*, supra; *Advanced Mining Group*, 260 NLRB 486, 507 (1982). Moreover, in the event that "the evidence is in conflict or otherwise inconclusive on particular indicia of supervisory authority, [the Board] will find that supervisory status has not been established at least on the basis of those indicia." *Phelps Community Medical Center*, 295 NLRB 486, 490 (1989). Conclusory evidence regarding the possession of Section 2(11) indicia, whether the evidence is contained in job descriptions, *Crittenton Hospital*, 328 NLRB 879 (1999), or testimony, *Sears, Roebuck & Co.*, 304 NLRB 193 (1991), is insufficient to establish supervisory status. Thus, where there exists general conclusionary evidence that individuals are responsible for supervising, directing, or instructing others, such evidence, standing alone, is deemed insufficient to prove supervisory status because it does not shed light on exactly what is meant by such general conclusionary words or whether an individual engaging in these activities is required to exercise independent judgment. For example, as the Seventh Circuit noted in *Westinghouse Electric Corp. v. NLRB*, 424 F.2d 1151 (7th Cir. 1970), there is enough play in the meaning of such terms that the Board is not bound to equate them with supervision in the statutory sense.

In reaching my decision with respect to the supervisory status of the RNs and LPNs in dispute, I must apply the principles established by the Board in the above cases as well as the holding of the Supreme Court in *Kentucky River Community Care, Inc.*, 352 U.S. 706 (2001).

Initially, in *Kentucky River*, the Supreme Court approved the Board's well-established precedent that the party asserting supervisory status has the burden of proof to establish such status. *NLRB v. Kentucky River Community Care, Inc.*, 352 U.S. at 710. Here, the Employer asserts that the RN and LPN unit nurses are statutory supervisors and therefore bears the burden of proof to establish supervisory status.

As noted above, a statutory supervisor must possess at least one of the indicia specified in Section 2(11) of the Act. *NLRB v. Kentucky River Community Care, Inc*., 352 U.S. at 710; *Queen Mary*, 317 NLRB 1302 (1995); *Allen Services Co.*, 314 NLRB 1060 (1994). Moreover, a statutory supervisor must exercise supervisory indicia in a manner requiring the use of independent judgment. With respect to most Section 2(11) indicia, the use of independent judgment is self-evident. However, when considering the supervisory authority to responsibly direct, it is more difficult, particularly in the health care industry, to define the use of independent judgment. In the health care field, the Board previously held that employees do not use independent discretion when they exercise ordinary professional or technical judgment in directing less skilled employees to deliver services in accordance with employer specified standards. In *Kentucky River*, the Supreme Court rejected this categorical exclusion. Rather, the Supreme Court found that such a categorical exclusion was improper, overbroad and "contrary to the statutory language." *NLRB v. Kentucky River Community Care, Inc*., 352 U.S. at 714.

Although the Supreme Court rejected the Board's categorical exclusion of professional judgment from Section 2(11) independent judgment, it did accept two aspects of the Board's interpretation of independent judgment. The Supreme Court agreed with the Board that the statutory term "independent judgment" is ambiguous and that many nominal supervisory functions may be performed without the exercise of such a degree of judgment or discretion as would warrant a finding of supervisory status under the Act. *NLRB v. Kentucky River Community Care, Inc.*, 352 U.S. at 714. The Supreme Court also recognized that judgment may be reduced below the statutory supervisory threshold by detailed regulations issued by an employer. Id. See also *Dynamic Science, Inc.*, 334 NLRB No. 57 (2001) (citing *Kentucky River*). Moreover, in *Kentucky River*, the Supreme Court held that the Board has discretion to determine the scope of judgment that qualifies as independent judgment within the meaning of Section 2(11) of the Act.

In *Kentucky River*, the Supreme Court noted that the Board defended its categorical exclusion based on policy considerations because it sought to preserve the inclusion of professional employees within the coverage of the Act. *NLRB v. Kentucky River Community Care Inc.*, 352 U.S. at 713. The Supreme Court found that the question presented did not involve the soundness of that labor policy which the Board was entitled to judge without second-guessing by the Court. Rather, the Supreme Court noted that the policy could not be given effect through the categorical exclusion of professional judgment from the meaning of independent judgment contained in Section 2(11) of the Act. The Supreme Court, citing *Providence Hospital*, 320 NLRB 717, 729 (1996), went on to suggest that the policy favoring the Act's coverage of professional employees might be accomplished by developing a "limiting interpretation of the supervisory function of responsible direction" that distinguishes employees

who direct the manner of others' performance of discrete tasks from employees who direct other employees. *NLRB v. Kentucky River Community Care Inc.*, 352 U.S. at 714.

In *Kentucky River*, the Supreme Court did not hold that all nurses are supervisors. Indeed, the Court did not even discuss the job duties of the nurses at issue nor did it decide whether those individuals are supervisors. Thus, the determination of the supervisory status of nurses and other individuals remains a fact-specific inquiry. Here, I must determine whether the evidence adduced at the hearings establishes that the Employer has satisfied its burden of proving that the RN and LPN unit nurses exercise a sufficient degree of discretion with regard to any of the Section 2(11) powers as to warrant the conclusion that they exercise independent judgment and not merely routine judgment. Given that I am bound to apply existing Board law, I will rely on the substantial existing body of Board law addressing the supervisory status of RNs and "charge nurses" to the extent that such case law rests on bases other than those rejected by the Court in *Kentucky River*.

As a general matter, I observe that for a party to satisfy the burden of proving supervisory status, it must do so by "a preponderance of the credible evidence." *Star Trek: The Experience*, 334 NLRB No. 29, slip op. at 6 (2001). The preponderance of the evidence standard requires the trier of fact "to believe that the existence of a fact is more probable than its non-existence before [he] may find in the favor of the party who has the burden to persuade the [trier] of the fact's existence." *In re Winship*, 397 U.S. 358, 371-372 (1970). Accordingly, any lack of evidence in the record is construed against the party asserting supervisory status. See, *Williamette Industries, Inc.*, 336 NLRB No. 59, slip op. at 1 (2001); *Michigan Masonic Home*, 332 NLRB No. 150, slip. op. at 1 (2000). As noted, "[W]henever the evidence is in conflict or otherwise inconclusive on a particular indicia of supervisory authority, [the Board] will find that supervisory status has not been established, at least on the basis of those indicia." *Phelps Community Medical Center.*, supra. The following is an examination of the Section 2(11) criteria applicable to the facts in those cases.

(b) Application to the Facts

Discipline, Suspend, and Discharge

Here, it is clear from the record that unit nurses have not had the authority to independently issue any degree of discipline to CNAs for a period of nearly a year prior to the instant proceedings. Moreover, the extent of the disciplinary authority that unit nurses exercised before that time is not entirely clear, as there was apparently supervisory review of any disciplinary action taken and the possibility, if not the probability, that any disciplinary action taken might by lessened or reversed by the DON or others who are undisputedly part of the Employer's supervisory and managerial hierarchy. I also note that there is no evidence that the purported disciplinary authority that was stripped from the unit nurses during the tenure of Williams was ever restored. Accordingly, I conclude that the unit nurses do not possess independent authority to issue discipline, suspend, or discharge other employees, or to effectively recommend such action within the meaning of Section 2(11) of the Act.

Reward and Promote

The Board has noted with regard to evaluations that Section 2(11) does not include the authority to "evaluate" among the criteria of supervisory functions. *Elmhurst Extended Care Facilities*, 329 NLRB No. 55 (1999). Accordingly, "when an evaluation does not, by itself, affect the wages and/or job status of the employee being evaluated, the individual performing such an evaluation will not be found to be performing a statutory supervisory function in evaluating employees." *Coventry Health Continuum*, 332 NLRB No. 13 (2000); see also, *Williamette Industries*, 336 NLRB No. 59 (2001). Here, the record does not clearly establish that the evaluations prepared by unit nurses, by themselves, have affected the wages and/or job status of the employees being evaluated.

The record shows that unit nurses completed evaluations before Williams' tenure as administrator and that they resumed evaluating employees within about 2 days prior to the first of the two proceedings here. The evaluation forms used pre and post Williams' tenure are different. However, each involves rating the employee on a scale in a number of distinct job performance categories. Neither evaluation contains a place for nor requests that the evaluating "supervisor" make recommendations regarding tenure, wage increases, or for any promotional opportunities. The pre Williams' evaluations contain a space for the signatures of the administrator and the "supervisor." The more recent evaluations contain a space only for a supervisor's signature. Anecdotal testimony indicates that these evaluations may be used as an aid in determining the amount of a CNA's wage increase. However, the record discloses that this decision is the administrator's alone and the Employer did not call an administrator to testify about the affect that evaluations or other factors have on wage increases. In this connection, the witnesses who testified on this point were unable to provide reliable estimates about an evaluation's potential impact on a wage increase. I conclude that the Employer has failed to establish that the participation of unit nurses in the evaluation process confers supervisory status on them because there is no definitive evidence that through this process they effectively recommend a reward or other personnel action for CNAs. *Coventry Health Continuum*, supra, slip op. at 3.

Moreover, the limited involvement of unit nurses in recommending CNAs for promotions is not indicative of supervisory status. In this regard, I note that there is no evidence that the "promotions" referenced in the record actually resulted in an increase of pay or benefits or that the jobs for which these CNAs were recommended are universally more desirable positions than that of a CNA who works on a resident unit. In addition, the testimony on this point provided by Acting Restorative Nurse Wright, who made the recommendations for promotion, was vague and inconclusive. Finally, it is not clear whether Wright was serving in any type of supervisory capacity at the time that she made her recommendations.

Transfer, Assign, and Responsible Direction

With regard to the assignment and direction of work, the record discloses that the types of assignment and direction involved appears to be routine. The Board has held, and the Supreme Court's decision in *Kentucky River* does not appear to distinguish, that such direction does not constitute "independent judgment" within the meaning of Section 2(11) of the Act. *Providence Hospital*, 320 NLRB 717, 725-730 (1996); *Ten Broeck Commons*, supra at 809-812. Regardless of my conclusion above as to the routine nature of the work assignments and directions given by unit nurses to the CNAs, the record discloses that there are certain situations in which the unit nurses maintain control over employees in areas unrelated to their greater experience or even resident care.

As noted, daily assignments of CNAs are primarily established by Gardner in her capacity as the scheduling nurse. However, unit nurses are often expected to adjust these assignments when one or more staff members report off work. Thus, for example, if a CNA leaves work early or calls off on the day or the evening shift, two halls will often share the three CNAs by having one of the three work some of the rooms on each hall. Sometimes the CNAs may decide informally amongst themselves how the patient load will be divided when there is a need for redistribution because of a staffing shortage. On other occasions, the unit nurses will tell the CNAs which patients to care for and the hall assignment necessary to achieve that coverage.

If a substitute CNA is found to fill in for the absent employee, then the unit nurse must determine for which patients the substitute CNA is responsible. This determination is affected by the substitute CNA's familiarity with the patients, his or her skills, the remaining available staff, and the patient census and acuity. The unit nurses make these adjustments to patient and hall assignments without consulting with stipulated supervisors.

CNAs' breaks are set on the schedule established by Gardner. However, they must check with their unit nurse prior to going on break to ensure continuity of patient coverage. The unit nurse may require that a CNA or CNAs defer their break until certain discrete patient care tasks have been accomplished or until another CNA returns from his or her break.

Unit nurses have the authority to excuse a CNA's tardiness for good cause shown. The excuse is noted by the unit nurse on the employee's attendance records and the tardy is not counted against the employee for disciplinary purposes. Unit nurses make the judgment as to whether a particular excuse warrants the inclusion of a notation on attendance records. They also release CNAs early from work for good cause shown such as the need to care for a sick child. Assuming minimum staffing levels are maintained, unit nurses do not have to seek approval from stipulated supervisors to permit an employee's early release.

Finally, with regard to assignments, I note that the Employer utilizes a daily assignment sheet on which each CAN's duties are set forth for their particular shift. Although CNAs themselves may, on occasion, write in their own assignments, the record reflects that unit nurses often write in specific patient assignments and that they indicate on these sheets additional

discrete tasks that they expect the CNAs to perform. As noted, the daily assignment sheets are often the same from day to day. However, when modifications must be made, it is the unit nurse who makes those modifications to ensure continuous and competent patient care.

With regard to responsible direction, I note that CNAs perform many of the same discrete resident care tasks on a daily basis. Many of these tasks are quite routine and involve basic care functions such as feeding, toileting, bathing, and turning of non-ambulatory residents. Unit nurses are responsible for ensuring that residents are properly cared for and that the CNAs are performing their resident care duties. Unit nurses direct CNAs to correct an omission in care, such as the failure to turn a resident, and they direct the CNAs to perform tasks in a particular order when they deem it necessary. For example, unit nurses tell CNAs to prepare and accompany residents on outings, including doctor's appointments and other medical appointments, and in the course of such instructions tell the CNAs to suspend whatever other task they are then working on. Unit nurses also instruct CNAs on how to properly perform certain tasks if the CNA is uncertain as to how to perform it or has exhibited difficulty in performing a task.

When a CNA has completed her resident care tasks for a particular shift, he or she may consult the CNA unit book to determine which additional tasks should be performed that day. However, unit nurses may also instruct CNAs to perform additional housekeeping tasks involving the residents' personal space and effects. Again, unit nurses make these types of assignments without consulting with higher authority.

With regard to the assignment and direction described above, such authority is unrelated to direction merely associated with the unit nurses' greater expertise. Rather, it indicates supervisory control and indicia. Thus, the record shows that the unit nurses responsibly direct other employees rather than the manner that they perform their task. Further, the record shows that the unit nurses use independent judgment to direct other employees.

Adjustment of Employee's Grievances

The Employer maintains a grievance procedure that references the participation of employees' immediate supervisors, but does not specifically identify the unit nurse as one of those supervisors. The formal grievance procedure has apparently not been used in connection with a unit nurse. However, unit nurses adjust patient loads for complaining CNAs and they also moderate other types of disputes between the CNAs working in their respective units. Only when they are unsuccessful in resolving a situation do they refer the matter to the DON. Thus, the record evidence establishes that unit nurses have the authority, in the interest of the Employer, to adjust employee grievances and that the exercise of their authority requires the use of independent judgment.

Secondary Indicia

There are several secondary indicators that support the conclusion that the unit nurses are statutory supervisors. Perhaps the most significant secondary indicia is the amount of time that

the Employer's facility would be left without any on-site supervision if the unit nurses are not found to be statutory supervisors. The only stipulated supervisors, with the exception of the sometime presence of Assistant Administrator Huff on the weekends, are present only on day shift, Monday through Friday. Additionally, although Gardner is on-call for scheduling purposes, the record is inconclusive as to whether her authority during off hours extends beyond the realm of scheduling issues. Accordingly, this factor favors the conclusion that the unit nurses are statutory supervisors.

There are other factors present in the record that buttress my conclusion that unit nurses are statutory supervisors. Thus, unit nurses, unlike CNAs, have keys to the Employer's facility, have complete access to the supply and the controlled substance areas, and have some timekeeping responsibilities.

III. CONCLUSION

Based on the unit nurses' extensive responsibilities to assign and responsibly direct the work of the CNAs, their involvement in adjusting employees' grievances, excusing employees' tardiness, and the existence of several secondary indicia militating in favor of supervisory status, I find that the RN and LPN unit nurses are supervisors within the meaning of Section 2(11) of the Act. Accordingly, I will exclude them from the units found appropriate. In this regard, the record discloses that unit nurses use independent judgment in determining how to staff their units and which CNAs to assign to particular patients, in altering break schedules as needed, in excusing CNAs' tardiness or their need to leave work early for what unit nurses determine to be good cause, and in directing CNAs to perform certain discrete tasks and modifying their assignments. See, *Custom Bronze & Aluminum Corp.*, 197 NLRB 397 (1972); *Demco New York Corp.*, 337 NLRB No. 135 (2002); *Avon Convalescent Center*, 200 NLRB 702, 706 (1972).

IV. EXCLUSIONS FROM THE UNIT

The parties agree, and the record shows, and I find that the following persons are supervisors within the meaning of the Act: Robert Huff, president and owner; Gary Armitage, administrator; Josh Huff, assistant administrator; Janice Roush, interim director of nursing: Christine Coldiron, assistant director of nursing; Carolyn Gardner, staff development coordinator; Jennifer Yeaney, MDS coordinator; Jeanette Wright, acting restorative nurse; Linda Edwards, dietary department head; Mike Stewart, maintenance/housekeeping and laundry department head; Charisse Blevins; therapy department head; Terri Deaton, activities director; Carolyn Conner, business office manager; Molly Eggleston, social services director; and Mandy Pothorf, admissions director. Accordingly, I will exclude them from the unit.

V. CONCLUSIONS AND FINDINGS

Based upon the entire record in this matter and in accordance with the discussion above, I conclude and find as follows:

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are affirmed.

2. The Employer is engaged in commerce within the meaning of the Act, and it will effectuate the purposes of the Act to assert jurisdiction in this case.

3. The Petitioner claims to represent certain employees of the Employer.

4. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

5. The following employees of the Employer in Case 9-RC-17783 constitute a unit appropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act:

> All full and regular part-time therapy technicians, employed by the Employer at its Dayton, Ohio facility, but excluding all office clerical employees, confidential employees, all other employees and all RNs and other professional employees, all guards, all LPN unit nurses and all other supervisors as defined in the Act.

6. The following employees of the Employer in Case 9-RC-17786 constitute a unit appropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act:

> All full-time and regular part-time licensed physical therapists, licensed clinical occupational therapists, and licensed speech language pathological therapists employed by the Employer at its Dayton, Ohio facility, but excluding all office clerical employees, confidential employees, all other employees, and all guards, all RN unit nurses, and all other supervisors as defined in the Act.

VI. DIRECTION OF ELECTION

The National Labor Relations Board will conduct a secret ballot election among the employees in the unit found appropriate above. The employees will vote whether or not they wish to be represented for purposes of collective bargaining by District 1199, WV/KY/OH, The Health Care and Social Service Union, SEIU, AFL-CIO. The date, time, and place of the election will be specified in the notice of election that the Board's Regional Office will issue subsequent to this Decision.

A. VOTING ELIGIBILITY

Eligible to vote in the election are those in the unit who were employed during the payroll period ending immediately before the date of this Decision, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Employees engaged in any economic strike, who have retained their status as strikers and who have not been permanently replaced are also eligible to vote. In addition, in an economic strike which commenced less then 12 months before the election date, employees engaged in such strike who have retained their status as strikers but who have been permanently replaced, as well as their replacements, are eligible to vote. Unit employees in the military services of the United States may vote if they appear in person at the polls.

Ineligible to vote are: (1) employees who have quit or been discharged for cause since the designated payroll period; (2) striking employees who have been discharged for cause since the strike began and who have not been rehired or reinstated before the election date; and (3) employees who are engaged in an economic strike that began more than 12 months before the election date and who have been permanently replaced.

B. EMPLOYER TO SUBMIT LIST OF ELIGIBLE VOTERS

To ensure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses, which may be used to communicate with them. *Excelsior Underwear, Inc.*, 156 NLRB 1236 (1966); *NLRB v. Wyman-Gordon Company*, 394 U.S. 759 (1969).

Accordingly, it is hereby directed that within 7 days of the date of this Decision, the Employer must submit to the Regional Office an election eligibility list, containing the full names and addresses of all the eligible voters. *North Macon Health Care Facility*, 315 NLRB 359, 361 (1994). This list must be of sufficiently large type to be clearly legible. This list may initially be used by me to assist in determining whether there is an adequate showing of interest. To speed both preliminary checking and the voting process, the names on the list should be alphabetized (overall or by department, etc.). Upon receipt of the list, I will make it available to all parties to the election, only after I have determined that an adequate showing of interest exists among the employees in the units found appropriate.

To be timely filed, the list must be received in the Regional Office, Region 9, National Labor Relations Board, 3003 John Weld Peck Federal Building, 550 Main Street, Cincinnati, Ohio 45202-3271, on or before **June 20, 2003**. No extension of time to file this list will be granted except in extraordinary circumstances, nor will the filing of a request for review affect the requirement to file this list. Failure to comply with this requirement will be grounds for setting aside the election whenever proper objections are filed. The list may be submitted by facsimile transmission at (513) 684-3946. Since the list will be made available to all parties to the election, please furnish **two** copies, unless the list is submitted by facsimile, in which case no copies need be submitted. If you have any questions, please contact the Regional Office.

C. NOTICE OF POSTING OBLIGATIONS

According to Section 103.20 of the Board's Rules and Regulations, the Employer must post the Notices to Election provided by the Board in areas conspicuous to potential voters for a minimum of 3 working days prior to the date of the election. Failure to follow the posting requirement may result in additional litigation if proper objections to the election are filed. Section 103.20(c) requires an employer to notify the Board at least 5 full working days prior to 12:01 a.m. of the day of the election if it has not received copies of the election notice. *Club Demonstration Services*, 317 NLRB 349 (1995). Failure to do so estops employers from filing objections based on nonposting of the election notice.

VII. RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, N.W., Washington, D.C. 20570-0001. This request must be received by the Board in Washington by 5 p.m., EDST on **June 27, 2003.** The request may **not** be filed by facsimile.

Dated at Cincinnati, Ohio this 13th day of June 2003.

/s/ Richard L. Ahearn

Richard L. Ahearn, Regional Director
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3003 John Weld Peck Federal Building
550 Main Street
Cincinnati, Ohio 45202-3271

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